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December 13, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 19, 2007

Case Number: TSO-0460

This Decision concerns the eligibility of xxxxxxxxxxxxxxxx (the individual) for an access authorization 1/ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria for Access to Classified Matter or Special Nuclear Material." Based on the record before me, I have determined that the individual's access authorization should not be restored.

I. Procedural Background

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. During a background investigation, the local security office (LSO) discovered some derogatory information that created a security concern. The LSO asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI did not resolve the security concerns. Consequently, in December 2006, DOE suspended the individual's access authorization.

The LSO issued a Notification Letter to the individual on December 14, 2006, in which it specified the derogatory information in its possession and how that information falls within the purview of criteria contained in 10 C.F.R. § 710.8 subsections (f) and (j) (Criteria F and J). 1/ Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a).

2/ Criterion F concerns information that the individual has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive Positions, Personnel Qualifications Statement, a Personnel Security Interview, written or oral statements made in response to an official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization. . . ." 10 C.F.R. § 710.8(f) (hereinafter referred to as Criterion F).

Criterion J concerns information that the individual "has been or is a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j) (hereinafter referred to as Criterion J).

individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case.

At the hearing that I convened, the DOE Counsel called one witness, the DOE consultant-psychiatrist. The individual called three witnesses: his supervisor, a co-worker and his girlfriend. The individual also testified on his own behalf. The individual and the DOE Counsel submitted a number of written exhibits prior to the hearing.

II. Standard of Review

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render an opinion based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

When reliable information reasonably tends to establish the validity and significance of substantially derogatory information or facts about an individual, a question is created as to the individual's eligibility for an access authorization. 10 C.F.R. § 710.9(a). The individual must then resolve that question by convincing the DOE that granting his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

III. Findings of Fact

In 2004, the individual submitted an updated Questionnaire for National Security Positions (QNSP) in connection with a reinvestigation of his eligibility to hold a security clearance. On the QNSP, the individual was asked, *inter alia*, the following: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" The individual checked "yes" to this question and indicated that he had been arrested for a November 2002 DUI. However, during a subsequent PSI with the individual on December 6, 2005, the individual discussed two additional alcohol-related

offenses, a 1999 Public Intoxication arrest and a 1990 Reckless Driving arrest. ^{1/} During the course of the PSI, the individual admitted that he did not divulge one of his arrests because he wanted to see if the investigator was “doing [her] job and would find it.” PSI at 23 and 24.

The individual’s statements during his PSI prompted DOE to refer him to a DOE consultant-psychiatrist (hereinafter referred to as “the psychiatrist”) for an evaluation, which was conducted on June 23, 2006. As part of the evaluation, the psychiatrist discussed the individual’s three alcohol-related offenses. According to the psychiatrist’s report, the individual’s first alcohol-related offense occurred in 1987 when he was charged with reckless driving after drinking in a club. The individual’s second offense occurred in 2002 when he was stopped for speeding after again drinking in a club. He was arrested for DUI and his license was suspended. The psychiatrist further stated that nine months later, in 2003, the individual was arrested for public intoxication after drinking on a boat with friends. ^{1/} The psychiatrist concluded that the individual’s two arrests within nine months qualifies the individual for a diagnosis of alcohol abuse. He further found the individual was still drinking alcohol and that not enough time had elapsed since his last alcohol-related offense for him to conclude that the individual is reformed or rehabilitated. Finally, the psychiatrist concluded that the fact that the individual did not divulge all of his alcohol-related offenses on his QNSP as well as the fact that the individual still drinks “suggest very strongly that [the individual] does pose a substantial risk of a lapse of judgment and reliability.” DOE Exhibit 9 at 3.

IV. Analysis

A. Security Concerns Cited Under 10 C.F.R. § 710.8 (f) and (j)

The Notification Letter cites Criterion F as one of the bases for the security concerns in this case. False statements or misrepresentations by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when an access authorization holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,515 (1995) (*affirmed* by OSA, 1995); *Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff’d*, *Personnel Security Review* (Case No. VSA-0281), 27 DOE ¶ 83,030 (2000)(terminated by OSA, 2000). This security concern applies, however, only to misstatements that are “deliberate” and involve “significant” information. 10 C.F.R. § 710.8(f) (Criterion F). Based on the record before me, I find that the individual deliberately misrepresented significant information on his QNSP. Consequently, DOE properly invoked Criterion F in this case.

^{3/} There is some discrepancy in the dates of the individual’s arrests. Documents provided at the hearing clarify that the individual’s Reckless Driving arrest occurred in 1985.

^{4/} During the hearing, the psychiatrist acknowledged that two of these dates, 1987 and 2003, were incorrect.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. Cases involving verified falsifications or misrepresentations are nonetheless difficult to resolve because there are neither experts to opine about what constitutes rehabilitation from lying nor security programs to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the misrepresentation or false statement and the individual's subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether restoring the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff'd*, *Personnel Security Review* (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (*affirmed* by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 (2001). In the end, as a Hearing Officer, I must exercise my common sense judgment whether the individual's access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c).

Criterion J is also cited as a basis for security concerns in this case. The Notification Letter states that the individual "has been diagnosed by a psychiatrist . . . as suffering from alcohol abuse." This derogatory information creates serious security concerns about the individual. In other DOE security clearance proceedings, hearing officers have consistently found that a diagnosis of alcohol abuse raised important security concerns. *See, e.g., Personnel Security Hearing* (Case No. VSO-0079), 25 DOE ¶ 82,803 (1996) (*affirmed* by OSA, 1996); *Personnel Security Hearing* (Case No. VSO-0042), 25 DOE ¶ 82,771 (1995) (*affirmed* by OSA, 1996); *Personnel Security Hearing* (Case No. VSO-0014), *aff'd Personnel Security Review*, 25 DOE ¶ 83,002 (1995) (*affirmed* by OSA, 1995). In this case, the risk is that the individual's excessive use of alcohol might impair his judgment and reliability to the point that he will fail to safeguard classified matter or special nuclear material. *See Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (December 29, 2005 Memorandum for William Leonard, Director, Information Security Oversight Office). I therefore find that the DOE properly invoked Criterion J when it suspended the individual's access authorization.

Since there is reliable derogatory information that creates substantial doubt concerning the individual's continued eligibility for access authorization, I need only consider below whether the individual has made a showing of mitigating facts and circumstances sufficient to overcome the DOE's security concerns under Criteria F and J.

B. Mitigation of Criterion F Concerns

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual's misrepresentations was serious. The individual's lack of candor concerning his alcohol-related offenses could increase his vulnerability to coercion or blackmail and raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful; this important principle underlies the criterion set forth in 10 C.F.R. § 710.8(f). This principle has been

consistently recognized by DOE Hearing Officers. *See, e.g., Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999).

During the hearing, the individual was questioned about his falsifications on his 2004 QNSP. The individual stated that, when asked about his alcohol or drug related offenses, he listed a 2002 DUI but did not list a 1999 Public Intoxication arrest or a 1985 Reckless Driving arrest. With respect to the arrests, the individual testified that he did not list these arrests on his QNSP because he believed he had previously reported them on a another security form, that they were minor and that it occurred a long time ago. Transcript of Hearing (Tr.) at 17. However, the individual acknowledged during the hearing that the QNSP did not state that previously reported arrests were exempt from disclosure. *Id.* The individual explained his 1999 Public Intoxication arrest occurred while he was drinking on a boat with a friend. The individual stated that he spent a night in jail and received a \$99 fine. *Id.* at 23. He further stated that he received a \$400 fine for the Reckless Driving charge. He acknowledged that he should have listed the arrests on his QNSP. The individual also testified that there was not enough room on the QNSP to list the 1985 and the 1999 arrests and stated that he did not know that he could list the arrests on the back of the form. *Id.* at 32. He reiterated that he believed the arrests were minor, old offenses. *Id.* The individual also acknowledged that when questioned during his PSI about not listing the arrests in his QNSP, he stated that he did not list one of the arrests because he wanted to see if the OPM investigator was doing her job and would discover it on her own. *Id.* at 31. He stated that he has a joking nature about him that somehow gets him into trouble. *Id.* at 55. Finally, the individual asserted that he did not “deliberately” falsify his 2004 QNSP. He reiterated that he believed that the arrests had already been discussed on a questionnaire he completed shortly after the incidents.

After considering all the evidence before me, I find that the individual has failed to mitigate the security concerns arising from his omissions about his alcohol-related arrests. Although the individual testified that he did not intentionally or deliberately falsify his QNSP, I find his explanation for his omissions to be unpersuasive. First, the individual did not come forward to report his omissions on his own volition. The individual admitted to his additional alcohol-related arrests during the course of a 2005 PSI. If the individual had not been interviewed at that time, there in no indication in the record that the individual would have come forward voluntarily to correct his falsifications. Second, at the time of his falsifications, the individual was a mature adult. Third, the individual acknowledged during the hearing that he should have disclosed the arrests since the QNSP did not exempt previously disclosed arrests. Fourth, and perhaps most significantly, the individual admitted to deceiving an OPM investigator to see if she would discover his previous arrests without him telling her. This acknowledgment demonstrates the individual’s dishonesty and lack of seriousness with respect to the nature of the questions asked on the QNSP. It also demonstrates the individual’s lack of understanding of the importance of being completely honest with the DOE. Again, I found the individual’s testimony regarding his falsifications to be unpersuasive. For all the foregoing reasons, I find that the individual has failed to mitigate the security concerns raised by Criterion F.

C. Mitigation of Criterion J Concerns

During the hearing, the individual maintained that there are mitigating factors that alleviate the agency's security concerns regarding his alcohol use. The individual disputes the psychiatrist's findings, specifically that the individual meets the criteria for alcohol abuse because he had two alcohol offenses in nine months. The individual testified that his first offense occurred in 1985, fourteen years before his second offense in 1999. Tr. at 67. He further testified that his third alcohol arrest occurred in 2002, three years later, and that there has been no occasion where he has had two offenses within nine months. *Id.* The individual stated that at the time of his last alcohol arrest in 2002, he was consuming about a six-pack of beer a week. *Id.* at 35. He stated that he currently consumes about a six-pack of beer weekly. When asked whether he drives after drinking, the individual stated that "if I do I have only had a couple [of beers] and I'm not legally intoxicated." *Id.* He testified that the night he was arrested for the 2002 DUI he was "totally out of character." According to the individual, "my wife had just left the month before and . . . I went over to talk to her and [it] didn't go [sic] a good conversation so I went out for a few beers and twenty-five miles later, . . . they stopped me because I was probably doing ten miles over and license plate light was out and I was on muscle relaxers. That, plus the liquor, and I didn't pass the sobriety test and I went to jail." *Id.* at 36.

The individual further testified that he has learned lessons from his alcohol-related behavior. Tr. at 44. He stated that his 2002 offense was his first DUI and that it was embarrassing, costly and time-consuming. *Id.* According to the individual, he has too much responsibility and can not afford to get into that kind of trouble. *Id.* The individual testified that he has never been hospitalized due to his alcohol consumption and was never told he has needed counseling for his alcohol consumption. ^{1/} When asked about his future intentions regarding his alcohol use, the individual testified that he drinks very little now and no longer gets drunk. *Id.* at 46. He described himself as currently consuming a few beers on the weekend without drinking to excess. The individual further testified that he would like to maintain the way he currently handles alcohol. *Id.*

D. Expert Testimony

In the administrative process, it is the Hearing Officer who has the responsibility for assessing whether an individual with alcohol problems has presented sufficient evidence of rehabilitation or reformation. *See* 10 C.F.R. § 710.27. Hearing Officers properly give a great deal of deference to the expert opinions of psychiatrists and other mental health professionals regarding rehabilitation and reformation. Moreover, it is my responsibility as Hearing Officer to ascertain whether the factual basis underlying the psychiatric diagnosis is accurate, and whether the diagnosis provides sufficient grounds, given all the other information in the record, for the denial of a security clearance. *See, e.g., Personnel Security Hearing* (Case No. VSO-0068), 25 DOE ¶ 82,804 (1996). On the basis of that evaluation, I find that the diagnosis made in the present case does not have a proper factual basis.

^{5/} The individual testified that he attended Alcoholics Anonymous for a short period of time after each incident. Tr. at 45.

The psychiatrist testified that he evaluated the individual in June 2006. He testified that he made his alcohol diagnosis based on the assumption that the individual met the criterion by having two alcohol arrests within nine months. After listening to the testimony at the hearing, the psychiatrist acknowledged that there was some discrepancy regarding the dates of the individual's arrests cited in his report and the dates he heard at the hearing. Tr. at 94. He testified that his diagnosis of alcohol abuse would not apply knowing that the individual's two arrests, in 1999 and 2002, were actually three years apart. *Id.* The psychiatrist further testified that he had no reason to believe that the [individual] "is currently a victim of alcohol abuse." *Id.* at 95. In his Report, the psychiatrist stated that five years must elapse before the individual would be considered rehabilitated from alcohol abuse. However, during the hearing, the psychiatrist testified that the five-year criteria would no longer be relevant. *Id.* at 97. Despite the retraction in his alcohol diagnosis for the individual, the psychiatrist testified that the individual still displayed poor judgment. The psychiatrist specifically refers to the individual's omissions on his QNSP as an example of his poor judgment. Tr. at 99. He further testified that he does not attribute his poor judgment to alcohol problems but rather to the individual's personality traits.

After considering the testimony of the psychiatrist, particularly his retraction of an alcohol abuse diagnosis, I find that the individual has mitigated the security concerns associated with Criterion J. According to the psychiatrist's testimony, the individual's last two arrests in 1999 and in 2002, occurring three years apart, do not meet the alcohol abuse criterion. The psychiatrist testified that there were some discrepancies in the dates given of the individual's arrests and that the individual currently no longer meets any criteria associated with alcohol abuse. In addition, the individual submitted documents to corroborate his assertion that his last two arrests occurred in 1999 and 2002. *See* Individual's Exhibit C and D. The individual's girlfriend also corroborated his testimony that he now drinks in low moderation, only a few beers on the weekend and not to the point of intoxication. Tr. at 123. Based on the foregoing, I find that the individual has mitigated the security concerns associated with his use of alcohol.

V. Conclusion

As explained in this Decision, I find that the local DOE security office properly invoked 10 C.F.R. §§ 710.8 (f) and (j) in suspending the individual's access authorization. For the reasons described above, I find that the individual has sufficiently mitigated the security concerns associated with his use of alcohol. However, I find that the individual has failed to mitigate the security concerns associated with Criterion F. I am therefore unable to find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: December 13, 2007